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Kevin L. Smith

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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

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No. 71A04-0710-CR-554

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March 12, 2008

MAY, Judge

Richard Carter was convicted after a jury trial of six counts of arson, five as Class B felonies and one as a Class A felony,¹ and two counts of criminal mischief, Class B misdemeanors.² Carter argues his sentence was inappropriate in light of his character and the nature of his offense. We affirm.

FACTS AND PROCEDURAL HISTORY

Carter attended a barbecue at the apartment of his cousin Deborah Pinkney; approximately fifteen others were also there. Deborah had recently moved into the apartment located on the lower level of a two-story wood house. After the barbecue, Pinkney asked the guests to leave so she could spend time with her friend, Joe Frazier. At that time, Carter began to argue with another guest, Lyndale Nelson. Pinkney again asked them to leave, as she did not want any trouble at her new apartment. Carter and Nelson went outside and fought. At this point, five people were left in the apartment: Pinkney, Frazier, an unrelated eight-year-old child, and two of Pinkney's four-year-old nieces. Ten to twenty minutes later, a brick was thrown through Pinkney's front window. Pinkney went outside and saw Carter running away. Pinkney chased Carter, but could not catch him and returned to her apartment.

Approximately twenty minutes later, Carter returned to the apartment wanting to talk to Pinkney. She refused to talk with him, refused to let him in, and told him she would talk with him the next day. Carter criticized her for "going . . . against the family." (Tr. at 143-44.) A very short time later, a flaming object was thrown through the window

¹ Ind. Code § 35-43-1-1.

² Ind. Code § 35-43-1-2.

and set the apartment on fire. Everyone in Pinkney's apartment escaped unharmed. The fire spread to an apartment on the second floor of the house, forcing Cheryl Anderson and two of her children to evacuate. Anderson lost consciousness due to smoke inhalation.

The State charged Carter with five counts of Class B felony arson, one count of Class A felony arson, and two counts of Class B misdemeanor criminal mischief. A jury found Carter guilty of all eight counts. The trial court merged the five Class B felony arson counts into one, sentencing Carter to ten years for that conviction. The trial court also sentenced Carter to thirty years for the Class A felony arson conviction and to six months for each Class B misdemeanor conviction. All sentences were to run concurrently.

We upheld Carter's convictions on direct appeal. *Carter v. State*, Cause No. 71A04-0107-CR-287 (Ind. Ct. App. January 30, 2002). Carter petitioned for post-conviction relief. The trial court amended the sentence by granting additional credit for time served; the length of sentence was not challenged at this hearing and remained at thirty years. Carter now appeals the post-conviction judgment, arguing the sentence is inappropriate in light of his character and the nature of his offense.

DISCUSSION AND DECISION

The State argues Carter has procedurally defaulted and thus waived any claim the court improperly ignored significant mitigating factors and inappropriately sentenced him. Post-conviction proceedings give defendants the opportunity to raise issues that were not available to them on direct appeal or that were not known at the time of the original trial. *Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002). Post-conviction

proceedings “do not substitute for direct appeals but provide a narrow remedy for subsequent collateral challenges to convictions.” *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). “[C]laims available on direct appeal but not presented are not available for post-conviction review.” *Bunch*, 778 N.E.2d at 1289.

Carter brought a direct appeal, arguing the State did not produce sufficient evidence to support his convictions. We affirmed. Carter’s argument the sentencing court ignored mitigating factors was known and available to him on direct appeal. A claim of sentencing error is forfeited when the defendant could have presented it on direct appeal but did not. *Taylor v. State*, 780 N.E.2d 430, 435 (Ind. Ct. App. 2002). Carter’s claim of sentencing error is not available for post-conviction review.

Nor does the record suggest Carter raised in his petition for post-conviction relief the argument the trial court ignored mitigating factors when sentencing him. “Issues not raised in a petition for post-conviction relief may not be raised for the first time on appeal.” *Emerson v. State*, 812 N.E.2d 1090, 1098-99 (Ind. Ct. App. 2004). As Carter’s claims of sentencing error were not raised in his petition for post-conviction relief, those claims may not now be raised.

We are unable to review the merits of Carter’s sentencing claim as they are not properly before us. Therefore, the judgment of the post-conviction court is affirmed.

Affirmed.

KIRSCH, J., and RILEY, J., concur.